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Artisan Partners Limited Partnership

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

EDWIN L. RESO, for the use and benefit of THE
ARTISAN INTERNATIONAL FUND, THE
ARTISAN INTERNATIONAL VALUE FUND
and THE ARTISAN MID CAP VALUE FUND,

Plaintiff,

vs.

ARTISAN PARTNERS LIMITED
PARTNERSHIP,

Defendant.

Case No. 3:11-cv-03137-PJH

**DEFENDANT ARTISAN PARTNERS
LIMITED PARTNERSHIP'S NOTICE OF
MOTION AND MOTION TO DISMISS
FOR FAILURE TO STATE A CLAIM
UNDER SECTION 36(b) OF THE
INVESTMENT COMPANY ACT OF 1940;
MEMORANDUM OF POINTS AND
AUTHORITIES**

DATE: October 5, 2011
TIME: 9:00 A.M.
Courtroom: 3
Hon. Phyllis J. Hamilton

Complaint Filed: June 24, 2011
Trial Date: Not Set

TABLE OF CONTENTS

	Page
NOTICE OF MOTION AND MOTION	1
MEMORANDUM OF POINTS AND AUTHORITIES	2
I. STATEMENT OF ISSUE TO BE DECIDED (LOCAL RULE 7-4(A)(3)).....	2
II. INTRODUCTION AND SUMMARY OF ARGUMENT	2
III. STATEMENT OF FACTS	3
IV. ARGUMENT	5
A. Pleading Standards	5
B. Reso Has Failed To State A Claim Under Section 36(b).....	6
1. Reso Misstates The Standard For Liability	6
2. Reso's Generic Allegations Attacking The Mutual Fund Industry As A Whole Should Be Disregarded	8
3. The <i>Gartenberg</i> Factors	9
a. Independence, Care And Conscientiousness Of The Funds' Disinterested Directors In Approving The Advisory Agreements	10
b. The Nature And Quality Of The Services Provided By APLP	13
c. Comparative Fee Structures	16
i. Fees Charged To Other Clients Of APLP	16
ii. Fees Charged To Other Funds By Other Advisers.....	17
d. Whether Economies Of Scale Exist And Are Appropriately Shared.....	19
e. Costs And Profitability Of Providing Investment Management Services	21
IV. CONCLUSION	22

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Amron v. Morgan Stanley Inv. Advisors, Inc.</i> , 464 F.3d 338 (2d Cir. 2006).....	passim
<i>Ashcroft v. Iqbal</i> , 129 S. Ct. 1937 (2009)	passim
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007)	5, 12, 21
<i>Bellikoff v. Eaton Vance Corp.</i> , 481 F.3d 110 (2d Cir. 2007).....	15
<i>Benak v. Alliance Capital Mgmt. L.P.</i> , No. 01-cv-5734, 2004 WL 1459249 (D.N.J. Feb. 9, 2004)	9
<i>Boyce v. AIM Mgmt. Group, Inc.</i> , No. 04-cv-02587, slip op. at 13 (S.D. Tex. Sept. 17, 2007).....	17
<i>Daniels-Hall v. Nat’l Educ. Ass’n</i> , 629 F.3d 992 (9th Cir. 2010).....	4
<i>Dreiling v. Am. Express Co.</i> , 458 F.3d 942 (9th Cir. 2006).....	4
<i>Gallus v. Ameriprise Fin., Inc.</i> , 497 F. Supp. 2d 974 (D. Minn. 2007)	8
<i>Gartenberg v. Merrill Lynch Asset Mgmt., Inc.</i> , 694 F.2d 923 (2d Cir. 1982).....	passim
<i>Hoffman v. UBS-AG</i> , 591 F. Supp. 2d 522 (S.D.N.Y. 2008).....	9, 18, 19, 20
<i>In re AllianceBernstein Mut. Fund Excessive Fee Litig.</i> , No. 04-cv-4885, 2006 WL 74439 (S.D.N.Y. Jan. 11, 2006)	11
<i>In re Evergreen Mut. Funds Fee Litig.</i> , 240 F.R.D. 115 (S.D.N.Y. 2007)	17, 20
<i>In re Franklin Mutual Fund Fee Litig.</i> , 478 F. Supp. 2d 677 (D.N.J. 2007)	15, 17
<i>In re Salomon Smith Barney Mut. Fund Fees Litig.</i> , 528 F. Supp. 2d 332 (S.D.N.Y. 2007) , <i>rev’d in part on other grounds</i> <i>sub nom R.W. Grand Lodge of F. & A.M. of Pa. v. Salomon Bros. All Cap.</i> <i>Value Fund, et al.</i> , No. 08-cv-0038, 2011 WL 2268551 (2d Cir. June 9, 2011) ...	13, 19, 20, 21
<i>In re Scudder Mut. Funds Fee Litig.</i> , No. 04-cv-1921, 2007 WL 2325862 (S.D.N.Y. Aug. 14, 2007).....	18, 20

1 **NOTICE OF MOTION AND MOTION**

2 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

3 PLEASE TAKE NOTICE that on October 5, 2011, at 9:00 a.m., or as soon thereafter as
4 counsel may be heard by the above-titled Court, located at 1301 Clay Street, Oakland, CA 94612,
5 Defendant Artisan Partners Limited Partnership ("APLP") will and hereby does move the Court for
6 an Order dismissing the Complaint of Plaintiff Edwin L. Reso for failure to state a claim upon which
7 relief can be granted under Section 36(b) of the Investment Company Act of 1940, as amended, 15
8 U.S.C. § 80a-35(b) ("Section 36(b)"). This Motion is made on the ground that Plaintiff's Complaint
9 fails to state a claim under Section 36(b) that is plausible on its face, in that the Complaint fails to
10 plead facts allowing a reasonable inference that APLP has breached its fiduciary duty with respect to
11 its receipt of compensation from Artisan International Fund, Artisan International Value Fund, and
12 Artisan Mid Cap Value Fund under the standard governing actions pursuant to Section 36(b) adopted
13 by the United States Supreme Court in *Jones v. Harris Assoc. L.P.*, 130 S. Ct. 1418 (2010). The
14 Complaint therefore should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil
15 Procedure for failure to state a claim upon which relief can be granted.

16 The full and legal bases for this Motion are set forth in the accompanying Memorandum of
17 Law. This Motion is based on this Notice of Motion and Motion; the accompanying Memorandum of
18 Law; the Request for Judicial Notice filed herewith; all pleadings, records and files in this action; and
19 upon all other matters that may be presented at the hearing on this Motion.

20
21 K&L GATES LLP

22
23 Dated: August 30, 2011

By: /s/ Claudia A. Quiroz

24 Edward P. Sangster
25 Claudia A. Quiroz
26 John W. Rotunno, *Pro Hac Vice*
27 Paul J. Walsen, *Pro Hac Vice*
Joseph C. Wylie II, *Pro Hac Vice*
Molly K. McGinley, *Pro Hac Vice*

*Attorneys for Defendant Artisan Partners
Limited Partnership*

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Defendant Artisan Partners Limited Partnership (“APLP”), by its undersigned counsel, hereby
3 respectfully submits this Memorandum in support of its Motion to dismiss the Complaint of Plaintiff
4 Edwin L. Reso for failure to state a claim upon which relief can be granted under Section 36(b) of the
5 Investment Company Act of 1940 (the “ICA”), as amended, 15 U.S.C. § 80a-35(b) (“Section
6 36(b)”).¹

7 **I. STATEMENT OF ISSUE TO BE DECIDED (LOCAL RULE 7-4(A)(3))**

8 Does the Complaint in this action plead sufficient facts, disregarding conclusions couched as
9 factual allegations, to allow the Court to draw the reasonable inference that APLP has breached its
10 fiduciary duty with respect to its receipt of compensation from Artisan International Fund, Artisan
11 International Value Fund, and Artisan Mid Cap Value Fund (each a “Fund,” and together, the
12 “Funds”), under the standard governing actions pursuant to Section 36(b) of the ICA adopted by the
13 United States Supreme Court in *Jones v. Harris Assocs. L.P.*, 130 S. Ct. 1418 (2010)?

14 **II. INTRODUCTION AND SUMMARY OF ARGUMENT**

15 Plaintiff Edwin L. Reso, a shareholder in the Funds, contends that APLP, the investment
16 adviser to the Funds, has breached its statutory fiduciary duty under Section 36(b) of the ICA “with
17 respect to the receipt of compensation for services” performed on behalf of the Funds. The
18 compensation was paid to APLP pursuant to investment advisory agreements approved by a majority
19 of the members of the Board of Directors of Artisan Partners Funds, Inc.² (the “Board”) who are not

20
21 ¹ APLP has separately moved to transfer this action to the United States District Court for the
22 Eastern District of Wisconsin, where APLP has its headquarters and principal place of business,
23 where the events giving rise to this action occurred, where the documents relevant to this action are
24 located, and where all but a handful of the material witnesses reside. It is appropriate, in light of the
25 possibility that venue may be transferred, for the Court to defer consideration of APLP’s Motion to
26 Dismiss until after the Court has ruled upon the Motion to Transfer. *See Peralta v. Countrywide*
27 *Home Loans, Inc.*, No. 09-cv-3288-PJH, 2009 WL 3837235, at *8 (N.D. Cal. Nov. 16, 2009) (“[i]n
view of the imminent transfer of this action, the court declines to hear defendant’s motion to
dismiss”); *U.S. ex rel. Haight v. Catholic Healthcare West*, No. 01-cv-1202-PJH, 2001 WL 1463792,
at *2 n. 2 (N.D. Cal. Nov. 9, 2001) (“[b]ecause the court transfers the action . . . the court does not
reach the motion to dismiss for failure to state a claim and for failure to plead with particularity”).
Accordingly, the Proposed Order submitted with APLP’s Motion to Dismiss contemplates either that
the Court will decline consideration of APLP’s Motion due to the transfer of this action, or that the
Court will grant the Motion.

² Prior to July 1, 2011, Artisan Partners Funds, Inc. was known as Artisan Funds, Inc.

“interested persons,” as that term is defined in the ICA (the “Disinterested Directors”), and by the Board as a whole, as required by the ICA, 15 U.S.C. § 80a-14(a).

Reso's Complaint expounds at length upon perceived deficiencies in the mutual fund industry in general, drawing upon the views of industry critics and commentators, but contains little pertaining specifically to APLP and the Funds for which it has served as investment adviser. Those few allegations that are directed to APLP and the Funds fall well short of pleading a claim that is plausible on its face under the standard adopted by the Supreme Court in *Jones v. Harris Assocs. L.P.*, 130 S. Ct. 1418 (2010), governing claims under Section 36(b). As a result, the Complaint fails to state a claim upon which relief can be granted and should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

III. STATEMENT OF FACTS

Each of the Funds is a separate series of Artisan Partners Funds, Inc., a registered open-end management investment company, commonly called a mutual fund. (Compl. ¶ 5) APLP serves as the investment adviser to the Funds. (*Id.* ¶¶ 6, 8)

As the Funds' investment adviser, APLP provides services necessary to the operation of the Funds. These services include, among many other things, making investment decisions to buy and sell securities and other financial instruments for the Funds; placing the Fund's portfolio transactions with broker-dealers, and negotiating the terms of such transaction services with those broker-dealers; providing personnel to serve as officers of the Funds and as members of the Funds' valuation committee; preparing the Funds' regulatory filings, which include the Funds' registration statement, statutory and summary prospectuses and statements of additional information, reports to shareholders, and semiannual reports to the Securities and Exchange Commission, among other regulatory filings; managing the Funds' legal, regulatory and compliance matters; monitoring shareholder trading activity; preparing (or supervising the preparation of) Board meeting materials; maintaining the calendars of the Board; providing or supervising the provision of Fund and shareholder services by the Funds' accounting and transfer agents; preparing Fund financial statements and coordinating financial statement audits; supervising tax return preparation; and furnishing all office facilities, equipment and personnel necessary to manage and supervise all of

1 each Fund's business and affairs. (*Id.* ¶¶ 8, 34; Investment Advisory Agreement for Artisan
2 International Fund (cited in Compl. ¶ 31), Exhibit A to Request for Judicial Notice (hereinafter "Req.
3 for Jud. Not."), at 1; Amendment No. 1 to Registration Statement of Artisan Partners Asset
4 Management Inc. (cited in Compl. ¶ 82), Exhibit D to Req. for Jud. Not. at 29 (hereinafter referred to
5 as "Amended S-1"; Statement of Additional Information ("SAI") (cited in Compl. ¶ 57), Exhibit E to
6 Req. for Jud. Not. at 45-46, 54)³

7 APLP performs these services pursuant to an Investment Advisory Agreement applicable to
8 each of the Funds (together, the "Advisory Agreements"). (Compl. ¶ 8) As set forth in the Advisory
9 Agreements, APLP receives a monthly fee from each Fund, computed as a percentage of that Fund's
10 average daily net assets. (*Id.* ¶ 32) The fee structure for each Fund includes various "breakpoints,"
11 which are asset thresholds beyond which the percentage used to compute the fee paid to APLP
12 declines. (*Id.* ¶ 33) The terms of each Advisory Agreement are substantially the same, although the
13 fee schedule for Artisan International Fund (the assets of which are greater than those of either of the
14 other two Funds) contains an additional breakpoint. (Investment Advisory Agreement for Artisan
15 International Fund (cited in Compl. ¶ 31), Exhibit A to Req. for Jud. Not.; Investment Advisory
16 Agreement for Artisan International Value Fund (cited in Compl. ¶ 31), Exhibit B to Req. for Jud.
17 Not.; Investment Advisory Agreement for Artisan Mid Cap Value Fund (cited in Compl. ¶ 31),
18 Exhibit C to Req. for Jud. Not.)

19 As required by Section 15(a) of the ICA, continuation of the Advisory Agreements must be
20 approved annually by the vote of a majority of the members of the Board who are not "interested
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24
25 ³ In considering a motion to dismiss, a court may take judicial notice of documents in the public
26 record. *Pugh v. Tribune Co.*, 521 F.3d 686, 691 n.2 (7th Cir. 2008); *Daniels-Hall v. Nat'l Educ.*
27 *Ass'n*, 629 F.3d 992, 998-99 (9th Cir. 2010). The Supreme Court also has approved consideration of
documents referenced in a complaint. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322
(2007); *see also Dreiling v. Am. Express Co.*, 458 F.3d 942, 946 n.2 (9th Cir. 2006) (court "may
consider documents referred to in the complaint or any matter subject to judicial notice, such as SEC
filings"). APLP has filed a separate request that the Court take judicial notice of the documents
referenced in this Memorandum, which are cited, or relied upon, in Plaintiff's Complaint.

persons” of the Funds or APLP, as defined by the ICA,⁴ and by the Board as a whole or by a majority of each Fund’s shareholders. 15 U.S.C. §§ 80a-15(a), (c).

The ICA imposes upon investment advisers a fiduciary duty with respect to the receipt of compensation from a mutual fund. *Jones*, 130 S. Ct. at 1423; 15 U.S.C. § 80a-35(b). In this case, Reso attempts to allege that APLP has breached this duty with respect to the compensation it received for services provided to the Funds. For the reasons discussed below, this attempt has failed.

IV. ARGUMENT

A. Pleading Standards

To satisfy federal pleading requirements, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A “statement of facts that merely creates a suspicion [of] a legally cognizable cause of action” is insufficient. *Twombly*, 550 U.S. at 555 (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, 235-36 (3d ed. 2004)). Plausibility requires “more than a sheer possibility that a defendant has acted unlawfully,” *Iqbal*, 129 S. Ct. at 1949, and a complaint pleading facts that are “merely consistent with a defendant’s liability . . . stops short of the line between possibility and plausibility” *Id.* (citing *Twombly*, 550 U.S. at 557). In order to state a claim that is plausible on its face, a plaintiff must plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 1949. In applying this standard, the court must disregard conclusions couched as factual allegations, as well as allegations which “amount to nothing more than a ‘formulaic recitation of the elements’” of a claim. *Id.* at 1951 (quoting *Twombly*, 550 U.S. at 555).

The Supreme Court has described a two-step approach to be followed by courts considering a motion to dismiss. A court should begin by identifying conclusions, which are not entitled to be taken as true, and exclude those allegations from further consideration. *Id.* The court should then

⁴ An interested person is one who has an interest in or affiliation with the investment adviser. 15 U.S.C. § 80a-2(a)(19).

1 assume the truth of the remaining allegations and “determine whether they plausibly give rise to an
2 entitlement to relief.” *Id.* at 1950-51. “[W]here the well-pleaded facts do not permit the court to
3 infer more than the mere possibility of misconduct, the complaint has alleged – but it has not
4 ‘show[n]’ – ‘that the pleader is entitled to relief.’” *Id.* at 1950 (*quoting* Fed. R. Civ. P. 8(a)(2)).

5 **B. Reso Has Failed To State A Claim Under Section 36(b)**

6 Section 36(b) of the ICA provides that “the investment adviser of a registered investment
7 company [mutual fund] shall be deemed to have a fiduciary duty with respect to the receipt of
8 compensation for services, or of payments of a material nature, paid by such registered investment
9 company . . . to such investment adviser” 15 U.S.C. § 80a-35(b). Section 36(b) also provides
10 that a fund shareholder may sue the adviser for a breach of such duty, but precludes an award of
11 damages “for any period prior to one year before the action was instituted.” 15 U.S.C. § 80a-35(b)
12 and (b)(3).⁵ In any such action, the approval of the adviser’s fee by a fund’s board is to be given
13 “such consideration by the court as is deemed appropriate under all the circumstances.” *Id.* § 80a-
14 35(b)(1), (2).

15 In its recent decision in *Jones*, the Supreme Court adopted the standard for liability under
16 Section 36(b) articulated by the Second Circuit in its 1982 decision *Gartenberg v. Merrill Lynch*
17 *Asset Mgmt., Inc.*, 694 F.2d 923 (2d Cir.1982). *Jones*, 130 S. Ct. at 1425-26. Under that standard, in
18 order for liability to exist on the part of an investment adviser, the fee charged by the adviser must be
19 excessive in the sense that it is “so disproportionately large that it bears no reasonable relationship to
20 the services rendered and could not have been the product of arm’s length bargaining.” *Id.*

21 *1. Reso Misstates The Standard For Liability*

22 Reso alleges that “a fee that is . . . not reasonable, is a breach of fiduciary duty.” (Compl. ¶
23 25) This is incorrect. Congress expressly rejected a “reasonableness” standard for adviser
24 compensation under the ICA, recognizing that subjecting advisory fees to a “reasonableness” review
25 would have the undesired effect of “charging the courts with rate-setting responsibilities.” *Jones*, 130
26

27

⁵ This action was filed on June 24, 2011, and hence Plaintiff Reso’s claim is limited to fees paid to APLP beginning June 24, 2010.

1 S. Ct. at 1430. Consistent with *Jones*, the Court should refuse Reso’s request for judicial supervision
2 over the “reasonableness” of investment advisory fees. *Id.* (“Congress’ approach recognizes that
3 courts are not well suited to make such precise calculations”).

4 This is not Reso’s only misstatement of the law. Reso’s Complaint is based in part upon the
5 premise that if the process of negotiating an advisory fee ostensibly is flawed, a Section 36(b) claim
6 may lie even where the advisory fee resulting from that process is not excessive. Specifically, Reso
7 alleges that the fiduciary duty standard of Section 36(b) “requires both good faith in the negotiation
8 process and a fair outcome.” (Compl. ¶ 26; *see also* ¶ 38) This is a misstatement of the standard
9 applicable to excessive fee claims under Section 36(b).

10 A deficient process cannot give rise to a breach of an adviser’s fiduciary duty established
11 under Section 36(b) if the fee that results from that process is not excessive. Put simply, if the fee
12 does not meet the “so disproportionately large” standard of *Gartenberg*, as adopted in *Jones*, there
13 can be no liability under Section 36(b) for receipt of an excessive fee. *Jones*, 130 S. Ct. at 1430
14 (“Section 36(b) is sharply focused on the question of whether the fees themselves were excessive”)
15 (*quoting Migdal v. Rowe Price-Fleming Int’l, Inc.*, 248 F.3d 321, 328 (4th Cir. 2001)).⁶ As the
16 Supreme Court emphasized in *Jones*, the ICA imposes a “fiduciary duty with respect to the *receipt of*
17 *compensation* for services, or of payments of a material nature.” *Id.* at 1430 (emphasis in original)
18 (*quoting* Section 36(b)). Thus, although the quality and integrity of the process followed by a board
19 may impact the degree of deference to be afforded to a board’s decision to approve an advisory fee
20 agreement, it is not in itself a determinant of whether Section 36(b) has been violated.

21 As the Supreme Court explained in *Jones*, if a board process was “robust,” the board’s
22 decision to approve an advisory agreement should be given “considerable weight.” *Id.* at 1429. If
23 the process was deficient or based upon incomplete information, the court should “take a more
24 rigorous look” at the outcome, *i.e.*, the resulting fee. *Id.* at 1430. Thus, even in the event of a
25 deficient or misinformed process, the focus remains where it belongs under Section 36(b) – on the fee
26

27 ⁶ Reso’s Complaint does not assert that the fees paid to APLP by the Funds were used for an
improper purpose. *See Jelinek v. Capital Research Mgmt. Co.*, No. 10-55221, 2011 WL 3701742, at
*1 (9th Cir. Aug. 24, 2011).

1 itself. *Id.* Accordingly, and contrary to Reso’s allegations, an asserted deficiency in process alone
2 cannot give rise to a violation of Section 36(b). Reso’s effort to elevate *process* to the same
3 importance as *outcome* (see Compl. ¶¶ 26, 38) is wrong as a matter of law.

4 Equally incorrect is Reso’s assertion (embedded in his quotation of *Pepper v. Litton*, 308 U.S.
5 295 (1939)), that APLP bears the burden of establishing the good faith and inherent fairness of its
6 Advisory Agreements with the Funds. (Compl. ¶ 26) The Supreme Court specifically called out the
7 inapplicability of this aspect of *Pepper* in *Jones*, stating that the ICA modifies the fiduciary duty
8 defined in *Pepper* “in a significant way,” in that it shifts to the party claiming a breach of Section
9 36(b)’s statutory duty the burden “to show that the fee is outside the range that arm’s-length
10 bargaining would produce.” 130 S. Ct. at 1427.

11 2. *Reso’s Generic Allegations Attacking The Mutual Fund Industry As A Whole*
12 *Should Be Disregarded*

13 In order to state a claim that is plausible on its face, a plaintiff must plead “factual content that
14 allows the court to draw the reasonable inference that *the defendant* is liable for the misconduct
15 alleged.” *Iqbal*, 129 S. Ct. at 1949 (emphasis supplied). Much of Reso’s Complaint, however, is
16 completely irrelevant to the issue of whether the defendant here, APLP, has violated Section 36(b) in
17 any way.

18 Reso devotes paragraph upon paragraph of his Complaint to generic allegations railing against
19 the mutual fund industry as a whole, including quotations from Warren Buffett, John Bogle, and
20 commentators with interests at stake – such as Steve Pomerantz, an “expert” paid to offer opinion
21 testimony on behalf of plaintiffs in other Section 36(b) litigation filed by the same counsel
22 representing Reso here. (Compl. ¶¶ 15-17, 23, 35, 59, 69, 73-74, 79; see, e.g., *Gallus v. Ameriprise*
23 *Fin., Inc.*, 497 F. Supp. 2d 974, 980-81 (D. Minn. 2007) (referring to proposed testimony by
24 plaintiffs’ expert Steve Pomerantz), *rev’d*, 561 F.3d 816 (8th Cir. 2009), *vacated*, 130 S. Ct. 2340
25 (2010)). These allegations add nothing to the Complaint apart from length. They provide no facts
26 supporting a reasonable inference that APLP has breached its fiduciary duty under Section 36(b).
27 Reso’s generic allegations should therefore be disregarded. *Amron v. Morgan Stanley Inv. Advisors,*
Inc., 464 F.3d 338, 342-44 (2d Cir. 2006) (affirming dismissal of Section 36(b) claim where

complaint “rel[ie]d heavily on generalities about deficiencies in the securities industry, and statements made by industry critics and insiders,” but failed to “set forth those facts necessary to a finding that the fees were excessive”); *Hoffman v. UBS-AG*, 591 F. Supp. 2d 522, 541 (S.D.N.Y. 2008) (dismissing Section 36(b) claim; holding that allegations based upon statements by SEC officials and on magazine articles that did not refer to the defendant could not satisfy the *Gartenberg* factor pertaining to the independence and conscientiousness of the fund’s directors).

3. *The Gartenberg Factors*

The *Gartenberg* decision, approved by the Supreme Court in *Jones* as “correct in its basic formulation of what § 36(b) requires,” established a non-exclusive list of six factors that the courts typically weigh in making the determination of whether an advisory fee is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm’s length bargaining. Those six factors are: (1) the nature and quality of the services provided to the fund and its shareholders; (2) the profitability to the adviser of its relationship with the fund; (3) “fall-out” benefits to the adviser; (4) whether economies of scale achieved by a mutual fund are shared with fund investors; (5) comparative fee structures; and (6) the independence, expertise, and conscientiousness of the disinterested members of the board in evaluating the advisory fee. *Gartenberg*, 694 F.2d at 929-32. No single factor is dispositive of this inquiry. *Benak v. Alliance Capital Mgmt. L.P.*, No. 01-cv-5734, 2004 WL 1459249, at *9 (D.N.J. Feb. 9, 2004) (dismissing Section 36(b) complaint; “Plaintiff has not pointed to a single case where allegations of excessive fees were sustained on the basis of only one of the six factors”).

The Complaint in this case attempts to plead each of the *Gartenberg* factors other than fall-out benefits, a factor which Reso apparently concedes does not support his claim against APLP.⁷ As discussed below, however, Reso has failed to plead facts sufficient to satisfy any of the other *Gartenberg* factors, as would be required to state a plausible claim under Section 36(b).

⁷ Fall-out benefits are “collateral benefits that accrue to the adviser because of its relationship with the mutual fund. . . .” *Jones*, 130 S. Ct. at 1426 n.5.

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company.” 15 U.S.C. § 80a-2(a)(9). A statutory presumption exists *against* a claim that a natural person is controlled by another person or an entity. *Id.* (“A natural person shall be presumed not to be a controlled person within the meaning of this subchapter.”).

Allegations of the type proffered by Reso here “relate too tangentially to the simple question of whether the investment advisers received excess compensation for the services they rendered.” *Migdal*, 248 F.3d at 329 (affirming dismissal of complaint and holding that allegations that directors received substantial compensation and were dependent on the adviser are insufficient to sustain an action under Section 36(b)); *Krantz v. Prudential Invs. Fund Mgmt. LLC*, 305 F.3d 140, 142-44 (3d Cir. 2002) (affirming dismissal of a Section 36(b) claim and holding that allegations that directors received a “large aggregate compensation” and served on multiple fund boards are insufficient to support a claim that they were interested); *In re AllianceBernstein Mut. Fund Excessive Fee Litig.*, No. 04-cv-4885, 2006 WL 74439, at *3-4 (S.D.N.Y. Jan. 11, 2006) (dismissing Section 36(b) complaint and holding allegations that disinterested directors received generous salaries, were beholden to the adviser for their positions and were recommended for their positions by the adviser failed to rebut presumption of independence under the ICA); *Verkouteren v. Blackrock Fin. Mgmt., Inc.*, No. 98-cv-4673, 1999 WL 511411, at *2-4 (S.D.N.Y. July 20, 1999) (dismissing complaint and holding that allegations that “outside directors all receive substantial compensation,” were appointed by the adviser, and “serve at the pleasure of . . . the Adviser” failed to meet the standard for liability under Section 36(b)).

Reso’s allegation that because the Disinterested Directors obtain and rely upon information “packaged and presented” by APLP (Compl. ¶ 45), they ostensibly are “in all practical respects dominated and unduly influenced by” APLP (*id.*), also is insufficient as a matter of law. *Migdal*, 248 F.3d at 331 (“plaintiffs’ assertions that the directors were dependent on the investment advisers for information sheds no light on the question of whether the directors are disinterested”). As the Second Circuit noted in *Migdal*, “[o]ne would expect any conscientious director to request information from management and staff on the day-to-day operations for which they are responsible.” *Migdal*, 248 F.3d at 331. Moreover, Section 15(c) of the ICA makes it the “duty of the directors of a registered investment company to request and evaluate, and the duty of the investment adviser to such company

1 to furnish, such information as may reasonably be necessary to evaluate the terms” of an investment
2 advisory agreement. 15 U.S.C. § 80a-15(c) (emphasis supplied). It simply cannot be the case that
3 compliance with a statutorily imposed duty to provide a fund board with information that it in turn
4 has a duty to request renders the board “dominated and unduly influenced” by the fund’s adviser.¹⁰

5 Reso’s remaining conclusory allegations, made “on information and belief,” that information
6 received and considered by the Board was not “adequate” for undefined reasons (Compl. ¶ 46), or
7 was somehow misleading (*id.* ¶ 47), and that the Board “rarely, if ever,” questioned information or
8 recommendations provided by the Adviser (*id.*), also are insufficient. *Twombly*, 550 U.S. at 557
9 (naked assertion of conspiracy “gets the complaint close to stating a claim, but without some further
10 factual enhancement it stops short of the line between possibility and plausibility of entitlement to
11 relief”) (internal quotations omitted). No non-conclusory facts are alleged concerning any respect in
12 which the information received by the Board ostensibly was inadequate or misleading, nor are facts
13 alleged concerning any instance in which the Board failed where appropriate to question information
14 or recommendations provided by APLP. In short, Reso offers no non-conclusory factual averments
15 to distinguish his allegations from unadulterated speculation.

16 Reso also speculates that the Board must not have had “sufficient and accurate information
17 necessary to understand Defendant’s true cost structure and, in particular, the economies of scale it
18 enjoys in providing investment advisory services to the Funds.” (Compl. ¶ 49) Putting aside the
19 inadequacy of the Complaint’s allegations concerning economies of scale (discussed in
20 Section IV. B. 3. d. of this Memorandum), it appears from Reso’s own allegations that his speculative
21 assumption that the Board lacked information concerning APLP’s cost structure is based solely upon
22 “*publicly available* documents” describing the Funds’ fee schedules and “breakpoints” in those
23 schedules. (*Id.* ¶¶ 48-49) (emphasis supplied) Nothing in Reso’s allegations is inconsistent with the
24

25 ¹⁰ Nothing in Section 15(c) limits the ability of the disinterested members of a mutual fund board to
26 consider advice and information provided by its independent counsel, or comparative fee and
27 performance data compiled by independent third parties such as Lipper Inc., nor does the Complaint
in this case assert that the Disinterested Directors of the Funds lacked or were denied access to such
sources of information and advice. Thus, although the Complaint alleges that information provided
to the Board was “packaged and presented” by APLP, it avoids any allegation that all the information
made available to the Board was *prepared* by APLP.

1 Board's informed consideration, and rejection, of the assumptions concerning economies of scale that
2 underlie the Complaint, and these allegations thus "stop short of the line between possibility and
3 plausibility." *Iqbal*, 129 S. Ct. at 1949.

4 *b. The Nature And Quality Of The Services Provided By APLP*

5 Reso's Complaint alleges next to nothing regarding the services provided by APLP. He states
6 that under the Advisory Agreements, APLP is obligated to "manage the investment and reinvestment
7 of the assets of the Funds," to furnish "office space, equipment, and personnel to manage the business
8 of the Funds," and to assume "expenses incurred in managing the funds," without delineation.
9 (Compl. ¶¶ 31, 34) In lieu of identification of the particular services performed by APLP, Reso
10 instead simply alleges ("on information and belief") that services provided by APLP other than
11 portfolio management are "de minimis and/or do not entail significant costs" to APLP. (*Id.* ¶ 35)
12 Reso similarly provides no detail concerning the quality of the services he alleges that APLP
13 performs (or the quality of any of the other services provided by APLP that go unmentioned in the
14 Complaint).

15 Reso's silence as to basic facts such as each Fund's performance as compared with its peers,
16 the specific services provided to the Funds, and the costs to APLP of performing those services,
17 renders the Complaint insufficient as a matter of law to satisfy the "nature and quality of services
18 provided" prong of *Gartenberg*. *In re Salomon Smith Barney Mut. Fund Fees Litig*, 528 F. Supp. 2d
19 332, 338 (S.D.N.Y. 2007) (dismissing Section 36(b) claim based upon allegedly excessive advisory
20 fees, 12b-1 fees, transfer agency and administrative fees, finding that complaint failed to allege
21 sufficient facts concerning the nature and quality of "the array of services offered to Fund customers,
22 such as telephone or web assistance or the ease with which transactions are effected"), *rev'd in part*
23 *on other grounds sub nom R.W. Grand Lodge F. & A.M. v. Salomon Bros. All Cap Value Fund*, No.
24 08-cv-0038, 2011 WL 2268551, at *2-3 (reversing ruling only as to Section 36(b) claim based on
25 transfer agency fees); *Amron*, 464 F.3d at 342-45 (affirming dismissal of Section 36(b) claim where
26 plaintiff failed to allege, among other things, that the Fund's performance was appreciably worse than
27 comparable funds).

1 Reso’s only allegation directed to any of the specific Funds at issue in this case is his
2 allegation that Morningstar gave one of the three Funds, Artisan International Fund, a “Stewardship
3 Grade” of “F” as to its fees. (Compl. ¶ 36) Reso acknowledges that other components of
4 Morningstar’s Stewardship Grade address regulatory issues, board quality, manager incentives, fees
5 and corporate culture, but he has chosen not to inform the Court of the grades awarded to Artisan
6 International Fund for these other components of the Stewardship Grade. The grades awarded to
7 Artisan International Fund for each of the components of the Stewardship Grade are as follows:
8 regulatory issues – A; board quality – B; manager incentives – C; and corporate culture – A. (*See*
9 Morningstar Stewardship Grade for Artisan International Fund, Exhibit F to Req. for Jud. Not.)¹¹ In
10 its Stewardship Grade report for each Fund, Morningstar opines that “Artisan deserves a great deal of
11 credit for maintaining an investment-focused culture and generally looking out for the fundholders’
12 interests.” (Exhibits F through H to Req. for Jud. Not. at 2)

13 Reso’s allegations also fail to provide the Court with information necessary to evaluate what
14 the fee component of Morningstar’s Stewardship Grade means in the context of a Section 36(b)
15 analysis. Morningstar has explained that the fee component of its Stewardship Grade is based solely
16 on a fund’s expense ratio, and how that expense ratio compares to the expense ratios of other funds
17 investing in similar asset types. (*See* The Morningstar Stewardship Grade for Funds, Exhibit I to
18 Req. for Jud. Not. at 2)¹² Moreover, the expense ratio utilized by Morningstar in assigning its fee
19 grade to Artisan International Fund includes not only APLP’s fee for the services *it* performs on
20 behalf of Artisan International Fund, but all other expenses incurred by the Fund, including expenses
21 for services not performed by APLP.¹³ The grade does *not* take into account the nature or quality of
22 the services performed by an investment adviser in exchange for its fee. (*Id.*)

23
24 ¹¹ Morningstar’s Stewardship Grades for Artisan International Value Fund and Artisan Mid Cap
Value Fund are attached as Exhibits G and H to Req. for Jud. Not., respectively.

25 ¹² As discussed in note 3, *supra*, the Court may consider Morningstar’s explanation of its
26 Stewardship Grade, and the Morningstar Stewardship Grade reports, because the Stewardship Grade
is referenced in the Complaint.

27 ¹³ The 1.23% expense ratio reported by Morningstar for Artisan International Fund appears in the
Complaint as the “Total Exp. Ratio” for the Fund, consisting of the advisory fee paid to APLP and
“Other Expenses.” (Compl. ¶ 66)

1 Morningstar assigned a grade of “F” to Artisan International Fund for the fee component of
2 the Stewardship Grade for one reason: the Fund’s total expense ratio falls above the 60th percentile
3 when compared to funds deemed by Morningstar to be peer funds. (*Id.*) In and of itself, this sheds
4 little or no light on whether the management fees paid by Artisan International Fund were excessive.
5 *Amron*, 464 F.3d at 345 (*citing Gartenberg*, 694 F.2d at 929 (“comparisons of fee structures [of
6 different funds] are of limited value in assessing whether the fees charged by any given fund are
7 excessive”)). As long as funds have different expense ratios, some funds will have lower expense
8 ratios than others, and some will have higher expense ratios. Moreover, absent allegations as to the
9 particular services provided, Reso’s allegation based on the fee component of the Morningstar
10 Stewardship Grade for the International Fund is meaningless. *In re Franklin Mut. Funds Fee Litig.*,
11 478 F. Supp. 2d 677, 686-87 (D.N.J. 2007) (allegations based on report from “FundExpenses.com”
12 that funds had “some of the highest fees in the industry” held insufficient to state a claim under
13 Section 36(b) because the complaint lacked facts “show[ing] how the fees were disproportionate to
14 the relationship between fees and services”) (internal citations omitted).

15 Reso attempts to cure this problem by alleging that the fees charged to the Funds “are
16 disproportionate to the services rendered for those fees and could not have been the result of an arm’s
17 length negotiation.” (Compl. ¶ 37) This allegation, however, is conclusory and thus is not to be
18 afforded any weight in evaluating whether the Complaint states a claim upon which relief can be
19 granted. *Iqbal*, 129 S. Ct. at 1951 (allegations which “amount to nothing more than a formulaic
20 recitation of the elements” of a claim must be disregarded) (internal citations omitted); *see also In re*
21 *Franklin*, 478 F. Supp. 2d at 686-87. Moreover, even if this conclusory allegation were supported
22 with proper factual averments (and it is not), the Supreme Court has made clear that the standard for
23 liability under Section 36(b) is higher – the advisory fee must be “*so disproportionately large* that it
24 bears *no reasonable relationship* to the services rendered and could not have been the product of
25 arm’s length bargaining.” 130 S. Ct. at 1426 (emphasis supplied). The Complaint falls short of this
26 standard. *See Bellikoff v. Eaton Vance Corp.*, 481 F.3d 110, 118 (2d Cir. 2007) (affirming dismissal
27 of Section 36(b) claim where complaint failed to “specifically allege that the fees were so
disproportionately large that they bore no relationship to the services rendered”).

1 c. *Comparative Fee Structures*

2 Reso attempts to compare the advisory fees charged by APLP to the Funds with fees charged
3 to other clients of APLP and fees charged by other advisers. (Compl. ¶¶ 64-68) Reso's attempt fails,
4 however, because he has not pleaded facts necessary to make either comparison meaningful.

5 i. Fees Charged To Other Clients Of APLP

6 Reso attempts to compare the advisory fees paid by the Funds to fees assertedly charged to
7 the California Public Employees' Retirement System (CalPERS), and fees for subadvisory services
8 performed for two non-Artisan mutual funds, Clearwater Investment Trust and Wells Fargo
9 Advantage Diversified International Fund. (Compl. ¶¶ 61-62)

10 Reso's allegations regarding fees charged to these clients fail to support a claim for excessive
11 fees. The ICA "does not necessarily ensure fee parity between mutual funds and institutional
12 clients" *Jones*, 130 S. Ct. at 1429. The Supreme Court has cautioned that:

13 [T]here may be significant differences between the services provided
14 by an investment adviser to a mutual fund and those it provides to a
15 pension fund which are attributable to the greater frequency of
16 shareholder redemptions in a mutual fund, the higher turnover of
17 mutual fund assets, the more burdensome regulatory and legal
18 obligations, and higher marketing costs.

19 *Id.* at 1428-29 (internal citations omitted). If the services rendered to fund and other clients are
20 significantly different, "then courts must reject such a comparison." *Id.* at 1429. Further, even if a
21 "large disparity" in fees exists "that cannot be explained by the different services," no claim exists
22 unless there also is "other evidence that the fee is outside the arm's-length range" *Id.* at 1429
23 n.8.

24 Here, Reso's allegations comparing the services rendered to the Funds and to APLP's other
25 clients consist entirely of conclusions (even then, some alleged on information and belief)
26 unsupported by facts. (*See* Compl. ¶¶ 55 ("[u]pon information and belief," services are "substantially
27 similar, if not identical"), 57 ("upon information and belief," differences in fees are not "justif[ied] by
differences in services")) Reso's allegations do not even address the differences noted in *Jones*
between the services provided to fund and other institutional clients, such as the more burdensome
regulatory requirements, greater frequency of redemptions, and higher turnover in assets which

1 characterize mutual funds. *See Jones*, 130 S. Ct. at 1428-29; *see also In re Evergreen Mutual Fund*
2 *Fee Litig.*, 240 F.R.D 115, 122 (S.D.N.Y. 2007) (leave to amend complaint denied as futile where
3 comparisons of mutual fund fees to “fees charged through special programs and predominantly to
4 retirement plans, financial services firms, and other institutional investors” were “not necessarily
5 informative when assessing whether fees are disproportionate to the services rendered”) (internal
6 citations omitted). The Complaint likewise ignores the differences between the spectrum of services
7 performed by an investment adviser to a mutual fund (such as those performed by APLP on behalf of
8 Artisan International Fund, Artisan International Value Fund, and Artisan Mid Cap Value Fund) and
9 the far more limited advisory services performed as a sub-adviser to another fund adviser, which
10 must then itself perform, or contract for the performance of, all the other services necessary to the
11 operation of mutual funds. Moreover, Reso’s allegations regarding fees charged to CalPERS five or
12 more years ago¹⁴ are irrelevant to the issue of whether APLP’s fees were excessive during the one-
13 year statutory limitation period contained in Section 36(b)(3). *See In re Franklin*, 478 F. Supp. 2d at
14 686 (dismissing Section 36(b) claim; “[p]laintiffs must plead facts showing that those violations
15 occurred during the statutory one-year period under Section 36(b)(3)”; *Boyce v. AIM Mgmt. Group,*
16 *Inc.*, No. 04-cv-02587, slip op. at 13 (S.D. Tex. Sept. 17, 2007) (granting motion to dismiss on the
17 ground that plaintiff failed to allege facts relevant to the one year “look back” period for a Section
18 36(b) claim).

19 ii. Fees Charged To Other Funds By Other Advisers

20 Reso compares the advisory fee, other expenses, and total expense ratio of Artisan
21 International Fund to those of Vanguard International Value Fund; of Artisan International Value
22 Fund to those of Vanguard International Explorer Fund; and of Artisan Mid Cap Value Fund to those
23

24
25 ¹⁴ Reso’s allegation concerning the fees charged to CalPERS do not comport with information
26 contained in that entity’s publicly available annual reports, on which Reso’s allegations presumably
27 are based. Reso alleges that the advisory fee paid by CalPERS ranged from 0.06% to 0.10% during
2001 to 2006. (*See* Compl. ¶ 61(a)) The CalPERS annual report for the fiscal year ended June 30,
2002 indicates at page 67 that APLP earned total management and performance fees of \$7.291
million managing reported net assets of \$608.738 million, which equates to an advisory fee of 1.20%
of net assets, well in excess of the 0.93% to 0.95% advisory fees paid by the Funds. (Compl. ¶ 66)
(*See* Exhibit J to Req. for Jud. Not. at 67)

1 of Vanguard Selected Value Fund. (Compl. ¶¶ 66-68) The comparisons drawn by Reso here are
2 inapt for a number of reasons, even putting aside the limited value of such comparisons generally.
3 *See Amron*, 464 F.3d at 345 (citing *Gartenberg*, 694 F.2d at 929 (comparisons of fees charged by
4 different advisers are of “limited value in assessing whether the fees charged by any given fund are
5 excessive”)).

6 First, Reso compares each Fund to a single Vanguard fund. Such a narrow comparison sheds
7 no light on whether the fees at issue here are excessive. *In re Scudder Mut. Funds Fee Litig.*, No. 04-
8 cv-1921, 2007 WL 2325862, at *17 (S.D.N.Y. Aug. 14, 2007) (dismissing a Section 36(b) claim
9 where plaintiffs “neglect[ed] to compare” the subject funds “to more than four – and, in four of the
10 six sets of comparisons, no more than two – other funds”).

11 Second, “[t]hat a mutual fund has an expense ratio higher than Vanguard, a firm known for its
12 emphasis on keeping costs low, raises little suspicion under this [*Gartenberg*] factor.” *Amron*, 464
13 F.3d at 345 (affirming dismissal of Section 36(b) claim); *see also Gartenberg*, 694 F.2d at 928,
14 (observing that the Senate Report on the bill that became Section 36(b) indicates that “a ‘cost-plus’
15 type of [investment advisory] contract is not required”).

16 Third, Reso’s assertions that the services provided to each of the Vanguard funds he has
17 selected are comparable to the services provided by APLP are conclusory and not supported by
18 allegations of fact. (See Compl. ¶¶ 64 (“on information and belief,” the services are “the same or
19 substantially similar”); 67 (“to the extent” there are differences in services, they are “de minimis or
20 do not entail significant costs to APLP”)). Such facts are necessary to make any comparison of fees
21 charged by different funds meaningful. *Migdal*, 248 F.3d at 327 (affirming dismissal of Section
22 36(b) claim; “plaintiffs’ comparison between the two underlying funds and three other mutual funds
23 is not particularly meaningful precisely because it does not address the particular services offered by
24 the defendants”); *Hoffman*, 591 F. Supp. 2d at 540 (dismissing Section 36(b) claim; finding that
25 plaintiff failed to adequately allege comparative fee structures where the complaint made “no
26 allegations about the comparative performance or services” of the subject fund). Reso alleges no
27 facts from which the Court could reasonably infer that any of his chosen Vanguard Funds are
sufficiently comparable to its alleged Artisan Fund counterpart. Indeed, the Complaint admits that

1 Artisan International Fund and Artisan International Value Fund do not even fall within the same
2 Morningstar category as the respective Vanguard fund to which each is compared.¹⁵ (Compl. ¶ 66)

3 *d. Whether Economies Of Scale Exist And Are Appropriately Shared*

4 Economies of scale may arise when the per-unit production costs of a product decline as a
5 result of increased output. *Hoffman*, 591 F. Supp. 2d at 539 n.32. Reso's attempt to plead a failure to
6 share economies of scale is based largely on generic allegations about the mutual fund industry as a
7 whole and theories about the existence of economies of scale. (See Compl. ¶¶ 69-74) For the reasons
8 discussed in Section IV. B. 2. of this Memorandum, these generic, one-size-fits-all allegations should
9 be disregarded. *See also Salomon*, 528 F. Supp. 2d at 339 (dismissing Section 36(b) claim and
10 holding economies of scale were not alleged sufficiently where "[a]side from non-Fund-specific,
11 economic analysis regarding theoretical economies of scale, the [complaint] contain[ed] no
12 allegations as to Defendants' costs in managing the Funds.").

13 The allegations in Reso's Complaint, such as they are, that are directed to the Funds boil
14 down to the following: (i) as the Funds have grown, so have fees paid by each Fund, notwithstanding
15 supposed economies of scale that have been "realized" via undefined means;¹⁶ (ii) no "meaningful"
16 savings have been shared with the funds; (iii) Clearwater International Fund, a mutual fund to which
17 APLP provides sub-advisory services, negotiated a fee schedule with breakpoints that are different
18 from those of the Funds; and (iv) Artisan International Fund assertedly has "slight" breakpoints.
19 (Compl. ¶¶ 75-77)

20
21 ¹⁵ According to the Complaint, Artisan International Fund falls within the Morningstar Foreign
22 Large Blend category, while the supposedly comparable Vanguard International Value Fund falls
23 within the Morningstar Foreign Large Value category. (Compl. ¶ 66) Also according to the
24 Complaint, Artisan International Value Fund falls within the Morningstar Foreign Small/Mid Value
category, while the supposedly comparable Vanguard International Explorer Fund falls within the
Morningstar Foreign Small/Mid Growth category. (Compl. ¶ 66) The Complaint does not explain
why these funds are nonetheless purportedly comparable notwithstanding their different Morningstar
classifications.

25 ¹⁶ Reso neglects to inform the Court that Artisan International Value Fund and Artisan Mid Cap
26 Value Fund are both closed to most new investors. (Amended S-1, Ex. D to Req. for Jud. Not. at 4,
27 23) The commentary to Morningstar's Stewardship Grade for these Funds observes that by closing
funds, APLP has demonstrated "that investment merit and good stewardship have trumped marketing
and asset gathering concerns at the firm," and that "its partners have been responsible stewards of
shareholders' capital." (Ex. F to Req. for Jud. Not. at 1-2; Ex. G to Req. for Jud. Not. at 1-2; Ex. H to
Req. for Jud. Not. at 1-2)

1 In order to allege economies of scale, however, a plaintiff must “make a substantive allegation
2 regarding the actual transaction costs at issue and whether the costs per investor increased or
3 decreased as the assets under management grew.” *Hoffman*, 591 F. Supp. 2d at 540 (affirming
4 dismissal of Section 36(b) claim; economies of scale not alleged). Reso makes no such allegations.
5 As a result, the Court is left unable to determine “whether any economy of scale even existed.” *Id.*;
6 *see also Amron*, 464 F.3d at 344 (economies of scale not alleged where plaintiff made “no allegations
7 regarding the costs of performing fund transactions or the relationship between such costs and the
8 number of transactions performed”) (internal citations omitted); *Krinsk v. Fund Asset Mgmt, Inc.*, 875
9 F.2d 404, 411 (2d Cir. 1989) (same); *Evergreen*, 240 F.R.D. at 121 (same); *see also Salomon*, 528 F.
10 Supp. 2d at 336-39 (“[p]laintiffs cannot meet their burden simply by pointing to the size of the funds
11 and their rates of growth”); *Scudder*, 2007 WL 2325862, at *16-17 (dismissing Section 36(b) claim
12 and concluding that amendment would be futile where, among other things, plaintiff’s allegations
13 merely presumed that economies of scale were achieved but did not explain how, and plaintiff failed
14 to specify how economies of scale were not passed on to investors).

15 Reso’s allegations with respect to the sub-advisory services provided by APLP to Clearwater
16 International Fund are flawed for an additional, independent reason. Reso alleges no facts sufficient
17 to permit any more than speculation as to whether the services provided to the Funds are comparable
18 to those provided to Clearwater International Fund, such that similar economies of scale could be
19 achieved. *See Jones*, 130 S. Ct. at 1428-29. Lacking such facts, there is no basis on which a
20 comparison of the fee structures applicable to the two disparate clients could be made. *Id.*; *see also*
21 *Hoffman*, 591 F. Supp. 2d at 540 (holding “the differential in breakpoints between sub-advisors and
22 investment advisors is irrelevant to the issue of economies of scale” in that “investment advisors and
23 sub-advisors perform distinct services” which “justify the different breakpoint arrangements”).

24 Finally, the Complaint itself makes clear that each Fund *does* in fact have breakpoints.
25 (Compl. ¶ 33) Therefore, economies of scale *are* being shared with the Funds, even assuming
26 incorrectly (as Reso apparently does) that breakpoints are the only means by which economies of
27 scale may be shared with investors. (As appears from the “SEC Report” cited in paragraph 72 of the
Complaint, many of the largest mutual funds do not employ *any* breakpoints. *See* SEC Division of

Investment Management, Report on Mutual Fund Fees and Expenses, Dec. 2000, Exhibit K to Req. for Jud. Not. at 32 (19 of the 100 largest mutual funds had “single fee contracts [that] do not employ breakpoints” of any kind))

e. Costs And Profitability Of Providing Investment Management Services

Reso devotes only four paragraphs of his Complaint to the costs and alleged profitability of the services APLP provides to the Funds. (Compl. ¶¶ 79-82) In sum, he alleges (“again, on information and belief”) that APLP’s financial reporting “is intended to, and does, obfuscate [APLP’s] true profitability” (*Id.* ¶ 79); that APLP’s incremental costs are “believed to be nominal,” while its fees are “unreasonable and excessive” (*Id.* ¶ 80); and, “[o]n information and belief,” that a yet-to-be performed “review” of APLP’s “full costs of providing management services” assertedly will demonstrate the “enormous profitability” to APLP of providing advisory services to the Funds. (*Id.*)

It is evident that each of these allegations is nothing more than wholesale speculation. And neither Reso’s allegations concerning the amount of *revenue* derived by APLP from the services performed on behalf of all Artisan Funds as opposed to other clients, nor the fee rates charged for the different services performed on behalf of these different clients, support his conclusions as to the profitability of those services. In the absence of factual allegations concerning APLP’s *costs* of providing services to the Funds, there is no way to determine the *profitability* to APLP of providing those services. *Amron*, 464 F.3d at 344 (affirming dismissal of Section 36(b) claim; allegations regarding fees “are irrelevant to a showing of profitability without some allegation of the corresponding costs incurred in operating the funds”); *Salomon*, 528 F. Supp. 2d at 338 (dismissing Section 36(b) claim where, *inter alia*, plaintiff alleged profitability without allegation regarding the corresponding costs incurred by the fund and failed to include allegations regarding the relationship of the growth of the fund and costs of performing fund transactions in support of economies of scale argument). Reso’s allegations thus fail to support a claim under Section 36(b).

Other facts will come, according to Reso, “[f]ollowing discovery of this information.” (Compl. ¶ 80) This wishful approach to pleading was insufficient even under the more liberal regime existing before *Iqbal* and *Twombly*. See *Migdal*, 248 F.3d at 328 (affirming dismissal of a Section

36(b) Complaint; “[w]hile Rule 8 is a liberal standard, plaintiffs cannot simply promise the court that once they have completed discovery, something will turn up”). It is all the more inadequate today, under the more stringent standards now applicable to federal court pleadings.

IV. CONCLUSION

The allegations in the Complaint do not allege a plausible claim under Section 36(b) of the ICA. Reso’s broad criticisms of the mutual fund industry do not supply the facts necessary to establish that APLP has breach its fiduciary duty as to any of the Funds. Reso alleges almost no facts specific to any of the Funds at issue, and the few allegations that do pertain to one or more of the Funds are plainly insufficient to allege a claim under Section 36(b). Artisan Partners Limited Partnership respectfully requests that the Court grant its Motion and dismiss the Complaint.

K&L GATES LLP

Dated: August 30, 2011

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